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**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. **576**.

SAMUEL OKIN,

*Petitioner,*

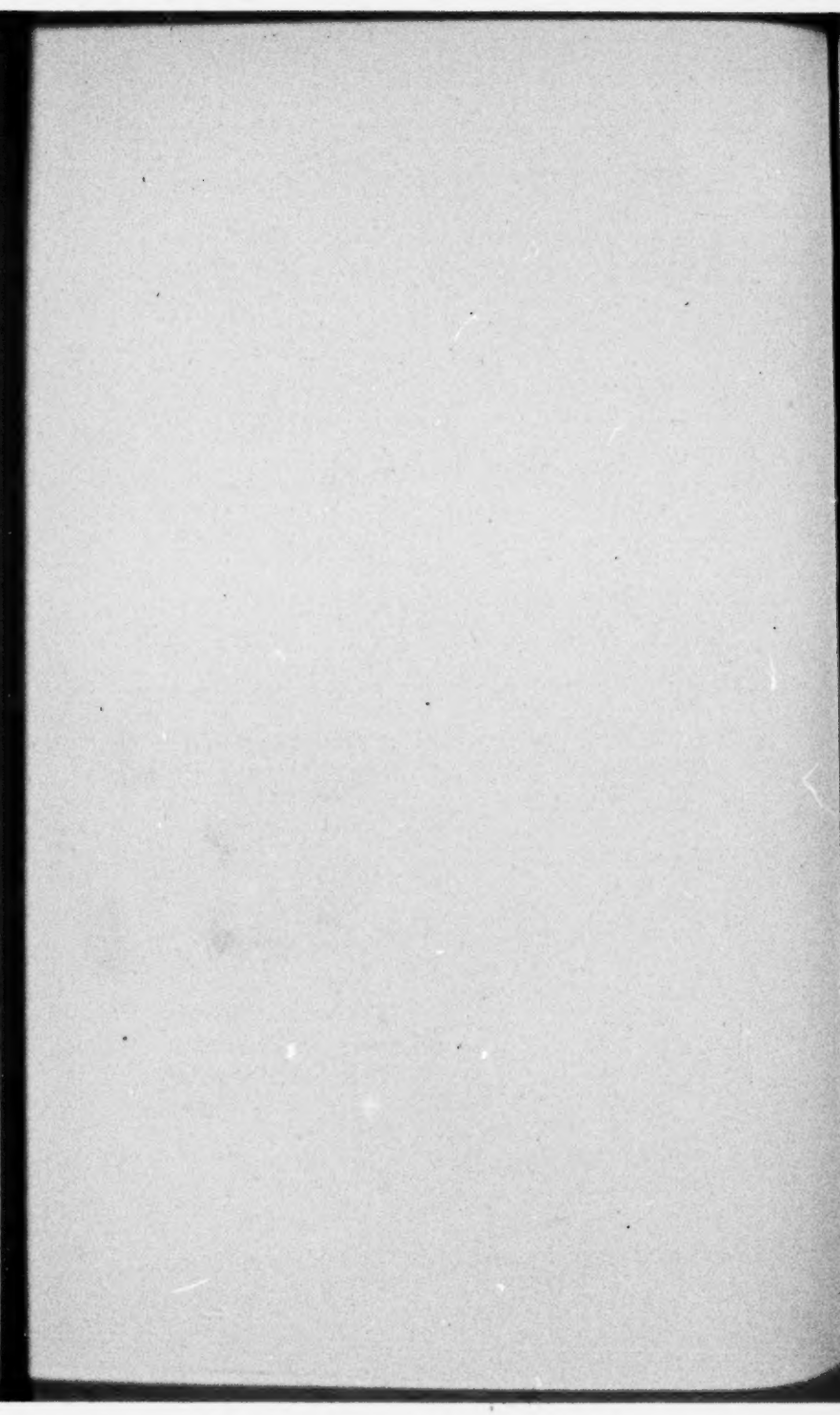
v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS,  
SECOND CIRCUIT.**

SAMUEL OKIN,  
*Attorney for Petitioner,*  
#32 Broadway,  
New York City.



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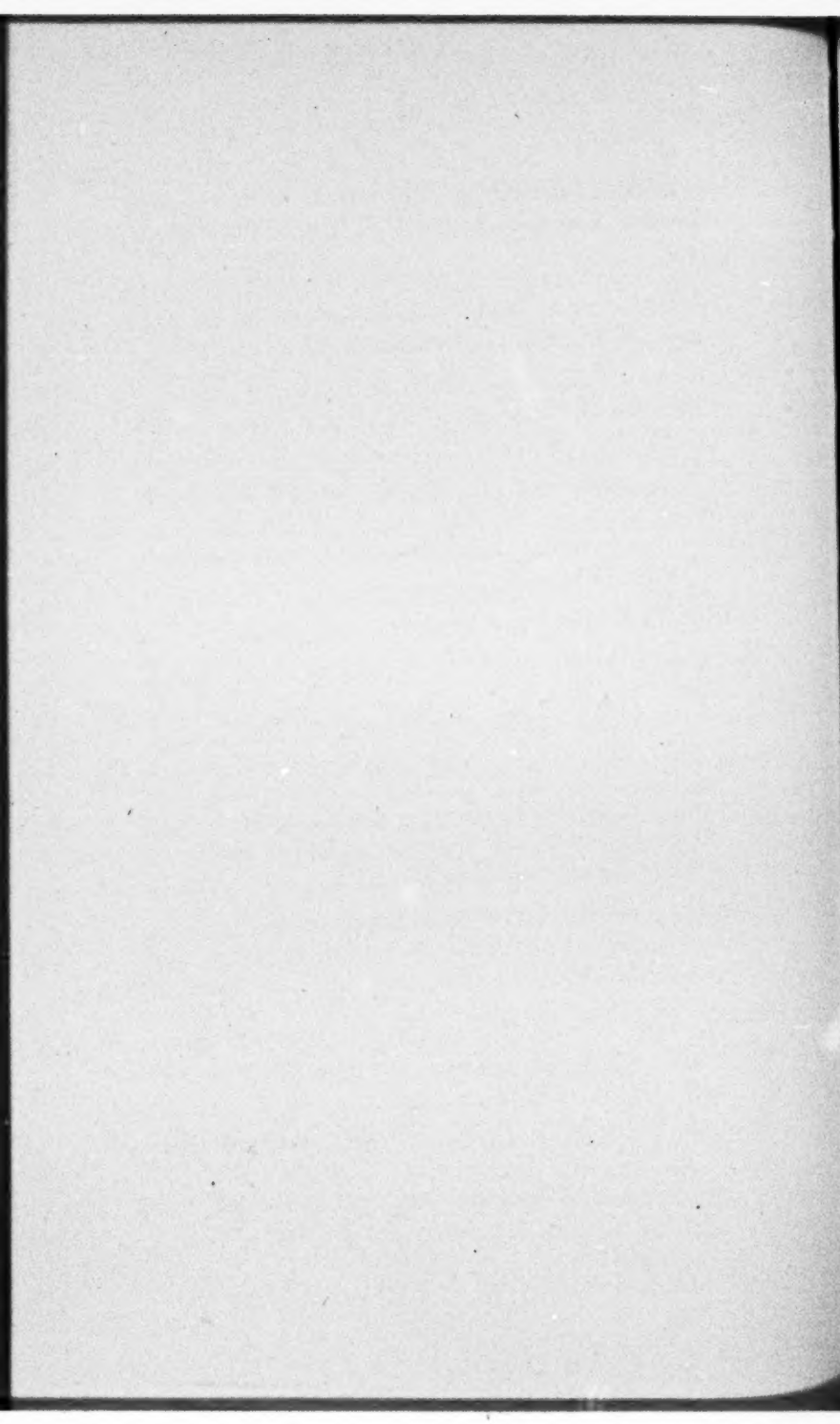
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SECURITIES AND EXCHANGE COMMISSION,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Petitioner, Samuel Okin, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, affirming the judgment and order of the United States District Court for the Southern District of New York.

### Opinions Below.

The Circuit Court of Appeals, Second Circuit, affirmed the judgment and order of the District Court on the opinion of the District Judge which is reported in 46 F. Supp. 481.



### Statutes Involved.

The Public Utility Holding Company Act of 1935 (U. S. C., title 15, secs. 79 to 79z-6).

Specific reference is made in the petition to the following sections of the said Act:

"Section 12(c). It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding company systems, to safeguard the working capital of public utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rule, regulations, or orders thereunder.

Section 20(a). The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. \* \* \*.

Section 24(a). Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals



for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. \* \* \*.

Section 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled 'An Act to establish a Court of Appeals for the District of Columbia', approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court."

## Questions Presented.

### I.

Is an action against an administrative body of the executive branch of the United States Government to enjoin it from acting beyond its statutory powers, an action against the United States and has the District Court of the United States jurisdiction of such an action?

### II.

Does Section 25 of the Public Utility Holding Company Act of 1935 authorize the commencement of an equitable action against the Securities and Exchange Commission where it is acting beyond its statutory power and in violation of said Act, and have the District Courts of the United States jurisdiction of such actions and to review Rule U-42 adopted by the said Commission.

### III.

Has the Securities and Exchange Commission the statutory power to adopt Rule U-42 under Section 12(c) of the Public Utility Holding Company Act of 1935 or any other provision of the said Act?

### IV.

Does the Public Utility Holding Company Act of 1935 authorize the Securities and Exchange Commission to prevent a registered holding company (Electric Bond and Share Company) from purchasing its own preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificates of consolidation which organized said corpora-

tion, without first obtaining the permission and order of the said Securities and Exchange Commission to make said purchases of said preferred stock?

### V.

Are the legal and property rights of the petitioner as a stockholder of the Electric Bond and Share Company being threatened and invaded by the acts of the Securities and Exchange Commission in preventing the said purchases of preferred stock by the said Electric Bond and Share Company?

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347[a]).

### Statement of the Case.

The petitioner, Samuel Okin, as owner and holder of record of nine thousand (9,000) shares of the common stock of the Electric Bond and Share Company, commenced an action on May 13th, 1942 for injunctive and other equitable relief against the Securities and Exchange Commission, to enjoin it from preventing the Electric Bond and Share Company from purchasing its own preferred stock with its own cash in accordance with the Certificate of Consolidation of the said Electric Bond and Share Company and as permitted by the laws of the State of New York, which said purchases are either by tender or in the open market; and to declare Rule U-42 promulgated by the said Commission, null and void and beyond the powers of the said Securities and Exchange Commission, as authorized by the provisions of the said Public Utility Holding Company Act

of 1935; and to enjoin the said Commission from enforcing the said Rule U-42 (R. 1).

A motion was made by the petitioner on May 19th, 1942, before District Judge Samuel Mandelbaum for preliminary injunctive relief (R. 10).

On the same date, the Securities and Exchange Commission moved to dismiss the action for lack of jurisdiction over the subject matter and person in that the said Commission contended that the said action was against the United States of America without its consent; and to dismiss on the ground of improper venue and to quash the return of service of summons (R. 10).

District Judge Mandelbaum denied the petitioner's motion and granted the Commission's motion (R. 11) and made the judgment and order denying the petitioner's motion and granting the Commission's motion and dismissing the action (R. 11), which was affirmed by the Circuit Court (R. 50).

The facts material to this application are as follows (R. 3-9):

The Securities and Exchange Commission is an independent agency in the executive branch of the Government of the United States.

The said Commission purporting to act pursuant to Section 12(c) of the Public Utility Holding Company Act of 1935 (U. S. C., title 15, secs. 79 to 79z-6) promulgated Rule U-42 which reads:

**“ACQUISITION, RETIREMENT AND REDEMPTION OF SECURITIES BY THE ISSUER THEREOF.**

- (a) General provisions.—No registered holding company or subsidiary thereof shall acquire, retire or redeem any security of which it is the issuer (or which it has assumed or guaranteed) except pursuant to a declaration notifying the Commission

of the proposed transaction, which has become effective in accordance with the procedure specified in Rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act."

(Exceptions are thereafter provided for which have no application to the facts herein.)

At all the times referred to in the complaint, the Electric Bond and Share Company was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, being the consolidation of the old Electric Bond and Share Company, whose certificate of incorporation was filed in the office of the Secretary of State of New York on February 28th, 1905, and Electric Bond and Share Securities Corporation whose certificate of incorporation was filed in the office of the Secretary of State of New York on January 16th, 1925, and the said certificate of consolidation pursuant to which the said Electric Bond and Share Company was organized was filed in the office of the Secretary of State of New York on March 13th, 1929.

Among the purposes enumerated in the said Certificate of Consolidation of the said Electric Bond and Share Company are the following:

"To purchase or otherwise acquire its own shares of stock (so far as may be permitted by law) and its bonds, debentures, notes, scrip or other securities or evidence of indebtedness and to hold, sell, transfer or reissue the same."

The said Certificate of Consolidation of the said Electric Bond and Share Company provides in paragraph numbered (g) as follows:

"The corporation from time to time may purchase any of its stock outstanding (so far as may be permitted by law) at such price as may be fixed by its Board of Directors or Executive Committee and accepted by the holders of the stock purchased, and may resell any stock so purchased at such price as may be fixed by its said Board of Directors or Executive Committee but in case the stock so purchased is subject to redemption, the price paid therefor shall not exceed the price at which it is redeemable."

On the 31st day of December, 1941, the said Electric Bond and Share Company had an earned surplus of \$63,116,391.94, and had issued and outstanding at least 283,000 of \$5 preferred stock and 1,101,955 shares of \$6 preferred stock as stated on the balance sheet of the said company as of December 31, 1941. At the time of the commencement of the aforesaid action, the said company had issued and outstanding approximately 280,000 shares of \$5 preferred stock and 1,100,000 shares of \$6 preferred stock.

Since on or about the 31st day of December, 1941, the said Electric Bond and Share Company had and has in its treasury cash and cash items which approximate \$24,000,000.

The said Electric Bond and Share Company was and still is a registered holding company under the provisions of the said Public Utility Holding Company of 1935, since on or about April 4th, 1938, but is not a public utility company as the term public utility company is defined in the said Public Utility Holding Company Act of 1935.

On or about the 30th day of December, 1941, the said Electric Bond and Share Company, pursuant to a resolution of the Board of Directors of the said company, duly adopted, filed a declaration with the Securities and Exchange Commission under Section 12(c) of the Public Utility Holding Company Act of 1935, and Rule U-42 adopted by the said Commission, in which said declaration the said Electric Bond and Share Company stated that it had



on hand the sum of approximately \$24,000,000 in cash and cash items which was not necessary for the business of said company, and the said company declared its intention to use \$5,000,000 of the said cash on hand in the purchase of its preferred stock on the New York Curb Exchange.

The Securities and Exchange Commission on the 20th day of February, 1942, made an order permitting the said declaration mentioned and described heretofore, to become effective only to the extent of \$2,000,000, and in said order the said Securities and Exchange Commission reserved jurisdiction with respect to the remaining \$3,000,000 pending the formulation by Electric Bond and Share Company of an exchange plan or plans for the distribution of assets of the said Electric Bond and Share Company to its preferred stockholders.

The said \$5 preferred stock of the said Electric Bond and Share Company sold as low as \$38 per share on the New York Curb Exchange during 1942; and the said \$6 preferred stock of the said company sold as low as \$40 per share on the New York Curb Exchange during 1942; and on May 12th, 1942, the said \$5 preferred stock sold for \$43 per share and the said \$6 preferred stock for \$48 per share on the said New York Curb Exchange.

The legal and property rights of the petitioner as the owner and holder of 9,000 shares of the common stock of Electric Bond and Share Company are being and have been invaded and threatened by the said acts of the said Securities and Exchange Commission and the persistent acts of the said Commission in enforcing the said Rule U-42 and its refusal to permit the said Electric Bond and Share Company to purchase its own stock with its own money as hereinbefore stated, is causing, has caused and will continue to cause irreparable damage to the petitioner without due process of law and in violation of the Constitution of the United States.



### **Specification of Errors To Be Urged.**

**The Circuit Court of Appeals erred:**

1. In holding that the District Court had no equitable and/or statutory jurisdiction to enjoin the Securities and Exchange Commission from exceeding its statutory authority under the Public Utility Holding Company Act of 1935.

2. In holding that the District Court had no jurisdiction to enjoin the Securities and Exchange Commission from enforcing Rule U-42 as being beyond the statutory authority of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.

3. In holding that the District Court had no jurisdiction to enjoin the Securities and Exchange Commission from in any way, shape or manner interfering with the purchase by the Electric Bond and Share Company of its own preferred stock, with its own money, in accordance with the laws of the State of New York under which said company was organized and pursuant to its certificate of consolidation which organized said corporation.

4. In not holding that an action against an administrative body of the executive branch of the United States Government to enjoin it from acting beyond its statutory powers, is not an action against the United States and that the District Court has jurisdiction of such an action.

5. In not holding that the District Court had jurisdiction of the petitioner's action against the Securities and Exchange Commission either as a matter of equity or by virtue of the provisions of Section 25 of the Public Utility Holding Company Act of 1935.

6. In not holding that the Securities and Exchange Commission exceeded its statutory authority when it promulgated and adopted Rule U-42, and that the District Court had jurisdiction to review the said Rule.

7. In not holding that the Securities and Exchange Commission has no statutory authority under the provisions of the Public Utility Holding Company Act of 1935 to in any way, shape or manner interfere with the purchase by the Electric Bond and Share Company of its own preferred stock with its own money in accordance with the laws of the State of New York under which said corporation was organized and pursuant to its charter.

8. In not holding that the petitioner is entitled to equitable relief against the Securities and Exchange Commission.

#### **Reasons for Granting the Writ.**

While the brief hereto annexed presents in more amplified form, the reasons relied on by petitioner for the allowance of the writ, these reasons may be summarized as follows:

The determination of the Circuit Court of Appeals is contrary to the decisions of this Court.

The issues involved present questions of vital public and national importance. This Court recently granted permission to the Securities and Exchange Commission to have reviewed the order of the Court of Appeals of the District of Columbia in the matter of Securities and Exchange Commission v. Chenery Corporation, which involved the issue of the jurisdiction of the Commission under the Public Utility Holding Company Act of 1935. It is respectfully submitted that this petition involves far more important issues than the said Chenery case, as this peti-

tion seeks the review of a judgment wherein is involved the jurisdiction of our Courts to enjoin the Commission from exceeding its powers under the said Public Utility Holding Corporation Act of 1935 and it is submitted that the issues involved herein not only affect millions of investors in the United States but affects the jurisdiction of the Courts over an administrative body of the United States Government, and warrants the examination and review by this Court of the judgment of the Circuit Court of Appeals, Second Circuit, affirming the judgment and order of the District Court for the Southern District of New York.

Dated, New York, December 3rd, 1942.

SAMUEL OKIN,  
Attorney for Petitioner.

